(a) Possession of the said upstairs portion of the said premises, No. 52 Hume Street, Ipoh;
(b) Judgment in the sum of $120/- being the arrears of rent due for the period 15th January 1948 to 14th May 1948 at the rate of $30/- per month;
(c) Mesne profits from the 15th May 1948 until possession is delivered;
(d) Costs.

The only point in this appeal is whether, in the circumstances of this case, rent paid by a sub-tenant of premises (the appellant) to the superior landlord (Chin Thin Sin) can be set off and treated as rent paid to his immediate landlord (the respondent).

Mr. Sharma submitted that it is always available to a sub-tenant to pay the rent of the premises to the superior landlord, ignoring his immediate landlord. He stated that from the record it was clear that rent was due by the respondent to the superior landlord Chin Thin Sin, and that therefore he had every right to demand the rent from the appellant, the sub-tenant of the respondent. However, the only evidence before the Court as to any rent being due by the respondent was that given by Chin Thin Sin, and of him the learned District Judge in his further Grounds of Judgment said :—

"(f) Having seen Chin Thin Sin in the witness box, I was convinced that he was deliberately lying and that he was doing exactly what the plaintiff complained that he was trying to do, namely to squeeze out his Chief Tenant."

I am not prepared to take a different view to that of the District Judge as to the credibility of that witness. In any event, the suggestion that the respondent had not paid his rent was never made to the appellant by Chin Thin Sin.

In support of his submission, Mr. Sharma cited the case of *Jones & Anor. v. Morris*[1]. However, on looking into the authorities on the subject, I find that *Jones & Anor. v. Morris*[1] is based on the decisions of *Graham & Ors. Assignees v. Allsopp*[2]; *Sapsford v. Fletcher*[3]; *Taylor v. Zamira*[4] and *Carter v. Carter*[5], and the principle to be adopted in such cases is fully set out in the judgment of Rolfe B. in the case of *Graham & Ors., Assignees v. Allsopp*[2] in which, after setting out the facts, *inter alia*, of a similar proposition to that submitted by Mr. Sharma, he says :—

"In support of this proposition the defendant relied on the cases of Sapsford v. Fletcher, Taylor v. Zamira, and Carter v. Carter. These cases establish the proposition that a tenant who has been compelled by a superior landlord or other incumbrancer having a title paramount to that of his immediate landlord, to pay a sum due for ground rent or other like charges, may treat such payment as having been made in satisfaction or part satisfaction of rent due to his immediate landlord, and may plead them, as far as they extend, in bar to any avowry for rent in arrear. The principle on which these cases rest is this: the immediate landlord is bound to protect his tenant from all paramount claims, and when, therefore, the tenant is compelled, in order to protect himself in the enjoyment of land in respect of which his rent is payable, to make payments which ought as between himself and his landlord to have been made by the latter, he is considered as having been authorized by the landlord so to apply his rent due or accruing due. All such payments would certainly give the tenant a right of action against his landlord, as for money paid to his use, and so would, in an action of debt for rent, form a legitimate subject of set-off; and though in replevin a general set-off cannot be pleaded, the Courts have given to the tenant the benefit of a set-off as to payments of this description, by holding them to be, in fact, the payment of the rent itself, or part of it."

From the above, it is quite apparent that if the payment to the superior landlord is a voluntary payment and not a compulsory one, then that payment cannot be treated as a set-off or as payment of the rent due. I agree with Mr. Tan Cheng Hock that in this present case, there is no evidence whatever that the payment by the appellant to Chin Thin Sin, the superior landlord, was in any way a compulsory payment. It must, therefore, be taken as a voluntary payment and such sums as were paid to him for rent of the upstairs premises of No. 52 Hume Street cannot be taken as payment of the rent due for those premises to the immediate landlord, the chief tenant — the respondent.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

CHONG FAH HIN v. PUBLIC PROSECUTOR

[A. Cr. J. (Russell J.) April 8, 1949]

[K. L. — Criminal Appeal No. 6 of 1949]

Criminal procedure — Application by accused person for adjournment to enable him to brief counsel — No delay — Customs Enactment, 1936, s. 114(i)(e).

This was an appeal against the conviction of the appellant for the offence of being in possession of uncustomed goods. The appellant, a native of Sepang, was arrested in Kuala Lumpur on the February 8, 1949. When charged he claimed trial and the trial was fixed for the February 12, 1949, bail being granted in the sum of $10,000.

On the February 12, 1949 when the case was called, the appellant stated he had been unable to find the sum of $10,000 necessary for bail and therefore had been unable to instruct counsel to defend him. He asked for an adjournment to enable him to brief counsel. This was refused, the trial proceeded and the appellant was convicted.

Held: (1) every accused person has a right, if he so desires to be defended by an Advocate and should be given sufficient time to instruct counsel; (2) in this case the appellant had been guilty of no delay in endeavouring to get bail and to brief counsel and his application for adjournment should have been granted; (3) in the circumstances the conviction must be quashed and a retrial ordered.

MAGISTRATE'S CRIMINAL APPEAL.

N. A. Marjoribanks for the appellant.

M. Suffian (D. P. P.) for the respondent.

Russell J. : — This appellant was arrested at about 12 noon on the 8th of February, 1949, in Kuala

Lumpur, it being alleged that at that time he was in possession of certain uncustomed goods.

On the following morning he was brought before the learned President of the Sessions Court at Kuala Lumpur and charged with an offence against section 114(i)(e) of the Customs Enactment, 1936. He claimed trial and his trial was fixed for the 12th of February, 1949 at 9.15 a.m. He was granted bail in the sum of $10,000 and on the 10th of February, being a native of Sepang, he wrote to his friends at Batu Laut for the purpose of getting them to furnish the required sum for bail.

On the 12th of February when the case was called on for trial, the accused who was still in custody stated to the learned President that he had been unable at such short notice to find the sum of $10,000 necessary for bail and therefore had been unable to instruct counsel to defend him. He asked for an adjournment to enable him to brief counsel, this request was refused and the trial proceeded.

At the trial the appellant made no defence and he was accordingly convicted and fined $10,000 and his motor lorry and goods were confiscated.

Every accused person has a right, if he so desires, to be defended by an advocate, and I was of the opinion that as the appellant had been in custody since his arrest, the time given to him to instruct counsel on his behalf was insufficient. The time was also insufficient for a stranger to Kuala Lumpur to contact his friends with the object of them furnishing bail in such a sum as $10,000. He wrote to his friends on 10th February and they arrived in Kuala Lumpur on the 12th, the morning of his trial.

The appellant was therefore, in my opinion, guilty of no delay whatsoever in endeavouring to get bail and to brief counsel, and I therefore allowed the appeal and quashed the conviction without considering the merits of the case. I also ordered a new trial before a different President, the appellant to be granted bail on the same terms until the re-trial can take place.

Re-trial ordered.

BUSU v. PUBLIC PROSECUTOR

[C. A. (Willan C.J., Bostock Hill and Spenser Wilkinson JJ.) April 30, 1949]

[K. L. — F.M. Criminal Appeal No. 46 of 1949]

Evidence Enactment (Cap. 10), s. 106 — Emergency Regulations, 1948, reg. 4(1)(a) — Possession of firearm — Onus of proof that accused did not have licence for the firearm.

In this case the appellant was convicted under reg. 4(1) of the Emergency Regulations, 1948, of being in possession of a shot gun and one round of ammunition. On appeal, it was submitted that as there was no *prima facie* evidence given by the prosecution that the appellant did not have a licence for the firearm, the conviction could not stand.

Held: in view of the provisions of s. 106 of the Evidence Enactment the burden of proving that the appellant is licensed is on him and it is not the duty of the prosecution to bring *prima facie* evidence to show that the appellant had no licence in respect of the firearm in his possession.

Cases referred to:

(1) *Lim Ah Tong v. Public Prosecutor* (1948-49) M.L.J. Supp. 158.

(2) *Rex v. Oliver* 29 Cr. App. R. 137.

(3) *R. v. Turner* (1816), 5 M. & S. 206

(4) *Public Prosecutor v. Chin Yoke* (1939) F.M.S.L.R. 203, 205; (1940) M.L.J. 47, 48.

COURT OF APPEAL (CRIMINAL).

Willan C.J. : — In this case the appellant was convicted under Regulation 4(1) of the Emergency Regulations, 1948, of (a) being in possession of a single barrelled shot gun and (b) being in possession of one round of ammunition.

The charge relating to the gun reads :—

"That you, on or about the 18th day of February, 1949, in or about Kampong Tebal and Tiga Batu, in the District of Temerloh, State of Pahang, did have in your possession a fire-arm, to wit one single barrelled shot gun, not being a fire-arm which you are duly licensed to carry or possess under any written law for the time being in force and that you thereby committed an offence punishable under Regulation 4(1)(a) of the Emergency Regulations, 1948".

Mr. Hall, for the appellant, submitted that since no *prima facie* evidence had been given by the prosecution that the appellant did not have a licence for the firearm the conviction could not stand. He cited the case of *Lim Ah Tong v. Public Prosecutor*[1]. We have read the full judgment in that case and the portion of it relied upon by Mr. Hall is underlined in the following passage :—

"Finally, there is one respect in which the learned trial Judge's summing-up was rather too favourable to the appellant. He stated that the prosecution must prove that the fire-arm, which was in the possession of the accused, was unlicensed and that he had no licence to possess it. We think this puts the matter too strongly. The prosecution should give *prima facie* evidence that a fire-arm in the possession of an accused is unlicensed; but if the accused in fact had a licence this is a matter